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No._____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

SANGER BOATS, INC. and
TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

LAWRENCE SCHWABENLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether an injury sustained by a boat salesman while preparing for a "drag boat" race satisfies the status and situs requirements of the Longshoremen's and Harbor Workers' Compensation Act, so as to entitle said employee to Longshore and Harbor Workers' Compensation benefits?

Whether the Longshoremen's and Harbor Workers' Compensation Act covers those persons working in the recreational boat industry?

LIST OF PARTIES

Sanger Boats, Inc. *
Travelers Insurance Company
Lawrence Schwabenland
Director, Office of Workers' Compensation Programs, United States Department of Labor

* Sanger Boats, Inc. has no parent companies or affiliates, but it has a subsidiary, Stellings Propeller, Inc., a Division of Sanger Boats

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Petitioner respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, No. 81-7064 and 81-7075, filed July 26, 1982, is reported at 683 F.2d 309. The opinion of the Benefits Review Board is reported at 13 BRBS 22. The opinion of the administrative law judge, dated April 20, 1979, is unreported.

JURISDICTION

The judgement of the Court of Appeals was entered July 26, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and ship-breaker, but such term does not include a master or member of a

crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

STATEMENT OF THE CASE

This case arises out of a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.

Lawrence Schwabenland began his employment with Sanger Boats, Inc. (Sanger) in 1968 and was in Sanger's employ at the time of his injury. Sanger is a manufacturer and seller of custom built, high performance, inboard engine recreational and racing boats; all production line boats, of which 75% were ski boats, weighed less than 3600 pounds.

Schwabenland was initially assigned to the shipping and receiving department, concerned primarily with sales and construction on the pleasure boat lines. After about two years, Schwabenland became

a boat salesman and manager. In this position Schwabenland's primary duties were to solicit and acquire orders for boats and other marine hardware. Incidental to each boat sale, because of the optional equipment and customizing ordered by each customer, Schwabenland overlooked the building of each boat to insure that all the options and customizing were included in the manufacture of the boat. Prior to delivery of each boat, Schwabenland inspected it for conformance with the customer's order and for any cosmetic defects; Schwabenland estimated that these visual inspections occupied 30% of his time. Any repairs or alterations needed were performed by other factory workers. Of the some 30 employees at the Sanger facilities, Schwabenland was the only salesman.

In addition to his sales duties, Schwabenland tested new production models

to determine their performance capabilities and also raced the employer's race boats at drag boat competitions sponsored by the National Drag Boat Association. He very seldom tested a boat prior to delivery. The purpose of the racing activities was to promote sales of Sanger manufactured boats. Schwabenland was engaged in this promotional activity between 25 to 30 times a year, mostly on weekends. Sanger had only two racing boats and Schwabenland was the only test/racing boat driver.

On July 29, 1973, in preparation for a major National Drag Boat Association event in Long Beach, California, Schwabenland was test driving a boat in the Oakland, California Estuary. The boat, Joker's Wild, was an 18-foot, six-inch, single seat, drag boat with a 426 cubic inch Chrysler engine and a weight of less than 2,000 pounds. After two or three trial runs in excess of 130 miles per hour,

the Joker's Wild flipped, causing injury to Schwabenland's left leg.

After each test run, the boat was lifted from the water, checked for fuel distribution and spark plugs, and then relaunched. Schwabenland did not assist in the launching nor did he perform engine repairs; occasionally, he did perform minor maintenance repairs.

The employer and insurance carrier disputed Schwabenland's claim for benefits as one not within the coverage under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the Act).

The claim was accordingly referred to an administrative law judge for hearing. In a Decision and Order filed April 20, 1979, the administrative law judge held that Schwabenland was not an employee under the Act as defined by 33 U.S.C. 902(3) and hence is not entitled to workers' compensation benefits under the

Act. The administrative law judge relied on the Benefits Review Board's Decision in Sedmak v. Perini North River Associates, 9 BRBS 378 (1978), wherein it was held that injury over navigable waters in and of itself is insufficient to determine the status of maritime employment and wherein the Benefits Review Board adopted the standard that, "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." Sedmak, supra, P. 385. After examining Schwabenland's overall work activities, the administrative law judge found that Schwabenland was not a ship-builder, shipbreaker, or ship repairman, the three types of activity specifically set out in 33 U.S.C. 902(3) as being maritime employment, nor did Schwabenland's

activities bear a realistic and significant relationship to maritime activities. Concluding that Schwabenland's activities were typical of and or incidental to the occupation of boat salesman, the administrative law judge held that Schwabenland was not an eligible employee under the Act.

Pursuant to a Petition for Review filed by Schwabenland, the Benefits Review Board issued a Decision and Order, filed December 11, 1980, affirming the Decision of the administrative law judge. In that Decision, the Board concluded it was not necessary to determine whether Schwabenland's work constituted maritime employment, since there had not been a showing that those activities which arguably could be maritime in nature, specifically the testing of new boat designs and participation in weekend boat races, occupied a substantial portion of

Schwabenland's work time, and thus, outside the scope of 33 U.S.C. 902(3).

The Ninth Circuit Court of Appeals, in an Opinion filed on July 26, 1982, reversed the Decision of the Benefits Review Board. The Court of Appeals concluded that Schwabenland's duties to inspect boats for cosmetic defects, to test the design of new models, and to perform occasional maintenance in connection with the testing activities were sufficiently related to the construction of vessels to constitute maritime employment covered under the Act. In analysing the Board's substantial portion test, the Court of Appeals acknowledged that the Supreme Court has never directly addressed this concept; nevertheless, the Court of Appeals interpreted the Supreme Court's decision in Caputo as being contrary to the substantial portion test used by the Benefits Review Board. After rejecting the Board's

"substantial portion test," the Court of Appeals held that Schwabenland's regular performance of these "maritime" activities, even though they constituted less than a substantial portion of his overall working time, was sufficient to satisfy the status requirement of 33 U.S.C. 902(3).

The Court of Appeals has concluded that the Supreme Court interpreted that the Act does not exclude persons employed in the recreational boating industry, citing as its authority the case of Parker v. Motor Boat Sales, Inc., 314 U.S. 244, decided by this Honorable Court in 1941. Although the Court of Appeals has acknowledged that the Act has been substantially amended since the Parker decision, it stated that

> there is no indication that Congress, in amending the Act, intended to limit its coverage solely to claimants injured in connection with the non-recreational boat industry. Moreover, to impose the difficult

> requirement of determining which operations are commercial and which are recreational would seem to conflict with the goals of the 1972 amendments to provide uniform coverage and to eliminate jurisdictional problems. Ninth Circuit Court of Appeals Opinion, Appendix A, Page 16.

REASONS FOR GRANTING THE WRIT

I

We submit that by its decision, the Court of Appeals misapprehends the import of P.C. Pfeiffer Company, Inc. v. Ford, 11 BRBS 320, 444 U.S. 69 (1979) and Northeast Terminal Corporation, Inc. v. Caputo, 6 BRBS 150, 432 U.S. 249 (1977) and extends liability under the Act without regard to the nature of the industry in which the claimant was engaged at the time of injury and without regard to the status as well as the situs required by the Act.

This Court, in Pfeiffer and Caputo, set out the substantive requirement of

both status and situs as joint conditions of coverage and entitlement to benefits under the Act. To be eligible for compensation, a person must be an employee as defined by 33 U.S.C. §902(3) and sustain injury on the situs defined by 33 U.S.C. §903(a).

It is respectfully submitted that the Decision of the Ninth Circuit Court of Appeals, herein, fails to follow the requirements of the Supreme Court decisions in Pfeiffer and in Caputo in that it virtually eliminates the status requirement and as such cannot be reconciled with the prevailing interpretation of the Act as announced by this Honorable Court.

33 U.S.C. 902(3) restricts the scope of the Act's coverage by requiring that the injured worker must have been engaged in maritime employment. The term "maritime employment" contained therein, refers to the nature of the worker's activities.

P.C. Pfeiffer Company, Inc. v. Ford, supra, at Page 325.

As this court pointed out in Caputo, neither the Act nor its legislative history defines "maritime employment," making it difficult to determine whether an injured worker has satisfied the "status" requirement where, as in this case, the injured worker's activities are not of the type traditionally performed by longshoremen. Further, does a worker whose activities are only tangentially maritime in nature satisfy the status test; that is, how remote from traditional maritime activities must activites of an injured worker be before he fails the status test?

It is clear that 33 U.S.C. 902(3) was enacted to limit and restrict coverage under the Act to certain occupations. Inherent in this occupation requirement is the fact that workers engaged in certain occupations though arguably maritime

connected would not be engaged in maritime employment with Section 902(3). The term maritime employment in Section 902(3) has not been interpreted to include those occupations which are only remotely maritime related. This court recognized these limits as they pertain to longshoring activities in its decisions in Pfeiffer and Caputo.

It is respectfully submitted that the Ninth Circuit Court of Appeals, herein failed to consider these limitations of 33 U.S.C. 902(3) when it held that some of the activities Mr. Schwabenland performed as a boat salesman provided sufficient basis to find that he was engaged in maritime employment within Section 902(3). Such a holding vitually eliminates the status requirement and as such is contrary to this court's decisions in Pfeiffer and Caputo.

II

It is respectfully submitted that the Ninth Circuit Court of Appeals holding, herein, that the small recreational boat industry is covered by the Act is contrary to the intent, purpose, and legislative history of the Act.

The Act was enacted to provide compensation benefits to those workers involved in the loading, unloading, or the repairing of ships who would not be entitled to state workers' compensation benefits. The Congressional debates and the committee reports to the 1927 Act indicate Congress' attempts to limit the scope of the Act. Congress was acting to provide coverage only to those persons injured in the building or repairing of large commercial vessels. With the exception of an exchange between Representative Graham, Chairman of the House Committee that reported on the 1927 Act, and Representative Abernethy,

the legislative history refers exclusively to the commercial ship industry. That exchange proceeded as follows:

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
>
> Mr. Abernethy: Yes.
>
> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small ship yard. I can assure the gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it cannot include a shipyard.
>
> Mr. Abernethy: As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham: That is correct.
>
> 68 Cong. Rec. 5403 (1927)

This exchange dispels any doubts that persons employed in the recreational boat

industry are not to be included within the scope of the Act.

A further manifestation of Congress' intent to limit the scope of the Act to commercial vessels appears in 33 U.S.C. 903(a)(1), wherein Congress specifically incorporated into the Act an "eighteen ton net exclusion." This exclusion precludes fishing vessels and other small boats from coverage under the Act.

Legislative history evidences no intent on the part of Congress to cover the small boat industry under the Act. 1972 amendments did nothing to alter that original intent. During the Congressional hearings on the 1972 amendments, not one piece of testimony was received from anyone associated with the small boat industry. This outright exclusion of the small boat industry from the hearings leads this petitioner to only one conclusion, that Congress did not consider or intend

workers in the small boat industry to be within the coverage of the Act.

The Court of Appeals, herein, based on this court's Decision in Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), concluded that, "the Supreme Court has implied that the Act does not exclude persons employed in the recreational boat industry." Ninth Circuit Court of Appeals Opinion, Appendix A, Page 15. This conclusion is clearly not consistent with the purpose and the legislative intent of the Act.

III

The Court of Appeals' finding that Mr. Schwabenland is an employee within 33 U.S.C. 902(3) and hence entitled to benefits under the Act does not comport with the express language of Section 902(3). Section 902(3) specifically states that the term employee for the purpose of the Act, "does not include a

master or member of a crew of any vessel."

It is undisputed that Mr. Schwabenland, at the time of his injury, was piloting a vessel in navigable waters, incurring injury when the vessel flipped over. Mr. Schwabenland was, therefore, both master and the crew of said vessel and as such, even though his employment could be characterized as maritime, the literal wording of the exception set forth under Section 902(3) precludes Mr. Schwabenland from recovering benefits under the Act.

Mr. Schwabenland, not being an "employee" as defined by 33 U.S.C. 902(3), is not entitled to compensation under the Act. Any and all remedies Mr. Schwabenland might have lies under the Jones Act, 46 U.S.C. 688.

The Court of Appeals refused to consider this vital issue, stating as its reason therefore: "On appeal, Sanger also

argues that Schwabenland, because he was 'the master or member of a crew' of a vessel, is not an employee under Section 2(3) of the Act, 33 U.S.C. 902(3). We need not consider this question because it was not raised before the Board." Ninth Circuit Court of Appeals, Opinion, Appendix A, Page 6.

We respectfully submit that the failure to raise this issue before should not and does not preclude a consideration of this issue by this Honorable Court. Since both the administrative law judge and the Benefits Review Board agreed that no coverage existed under the Act by virtue of the absence of status, the claim for benefits was dismissed. There is no reason to believe that had the issue of the Jones Act exclusion been raised it would have been addressed or determined by the initial trier of fact, the administrative law judge or the Benefits

Review Board. Failure therefore to raise this issue is moot in light of the chronology of the judicial and appellate process.

If for any reason this Honorable Court concludes that the decision of the administrative law judge must be annulled, we urge that the matter be referred to the Benefits Review Board to allow it to hear and decide all other issues relevant to their decision, including the exclusions set out in 33 U.S.C. 902(3).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted and the judgement to the Court of Appeals reversed.

Respectfully submitted,

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